EMPLOYER SUPPORT OF
THE GUARD AND RESERVE

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Questions and Answers for Employers and Employees who participate in the National Guard and Reserve.

The **Uniformed Services Employment and Reemployment Rights Act (USERRA)**, enacted October 1994 and significantly updated October 1996, provides protection and rights of reinstatement to employees who participate in the National Guard and Reserve.

The **National Committee for Employer Support of the Guard and Reserve (NCESGR)**, an agency within the Office of the Assistant Secretary of Defense for Reserve Affairs, operates programs directed toward U.S. employers, employees, and communities to ensure understanding of the role of Reserve component members. NCESGR encourages development of employer policies and practices to facilitate employee participation in the Reserve components through a network of volunteers in 54 local Employer Support of the Guard and Reserve (ESGR) Committees.

The ESGR **Ombudsman program** provides informal mediation services in conjunction with the Veterans' Employment and Training Service (VETS), U.S. Department of Labor. Volunteer members are trained by NCESGR and VETS to provide assistance to employers and employees in the resolution of employment conflicts that can result from military membership, training, or other service requirements protected under USERRA.

ESGR Ombudsman:

If no name appears in this block, please contact NCESGR at 1-800-336-4590.

To reach your local ESGR Committee for information or assistance, contact:

- the NCESGR website at "www.esgr.org"
- call NCESGR toll-free, at 1-800-336-4590
- call your local National Guard or Reserve unit

The information provided herein should not be considered legal authority, but is provided as general information about the USERRA .

USERRA Facts, Questions and Answers *For Employers*

1. Is an employee protected from unlawful discrimination by an employer based on military affiliation?
Yes. USERRA provides protections for initial hiring and adverse employment actions by an employer if the action relates even in part to the employee's military service. This protection also extends to potential witnesses of a discriminatory action on the part of the employer.

2. Can an employer refuse to allow an employee to attend scheduled drills or annual training?
No. Employees must be excused from work to attend inactive duty training (drill) or annual training and the employer must treat the employee as if he or she has not been absent.

3. Is there a limit to the amount of military leave an employer must permit?
Yes. Although there is no longer any differentiation between voluntary and involuntary military duty, there is a 5-year cumulative service limit on the amount of voluntary military leave an employee can use and still retain reemployment rights.

4. What is not included in the 5-year cumulative total?
The 5-year total does not include: inactive duty training (drills), annual training, involuntary recall to active duty, or additional training requirements determined and certified in writing by the Service Secretary, and considered to be necessary for professional development or for completion of skill training or retraining.

5. Is prior notice to the employer required for leave of absence for military duty?
Yes. Unless precluded by military necessity, advance notice must be provided either orally or in writing. The context for what constitutes timeliness of notification was not spelled out in detail by Congress under USERRA. However, employees who participate in the National Guard or Reserve should provide their employers as much advance notice as possible. Failure to provide notice could result in a denial of the protection of USERRA.

6. What are valid military orders?
All written or verbal orders are considered valid when issued by competent

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7. When may an employer require an employee to provide official, written military orders?

After periods of military leave of absence for more than 30 days, the employer has the right to request such documentation, which can be used to establish the employee's basic eligibility for protection under USERRA. All National Guard and Reserve members are encouraged to provide a copy of orders, the annual drill schedule, or other type of documentation to employers as soon as available and, if possible, before the commencement of military duty.

8. What if the employee cannot provide satisfactory documentation for military service in excess of 30 days?

The employer must promptly reinstate the employee pending its availability. The employer may contact the military unit if necessary.

9. Can an employer require an employee to apply for military leave of absence or otherwise submit official documentation for approval of military leave of absence?

No. As stated earlier, an employer may not require documentation for notification prior to military duty. Further, an employer does not have a "right of refusal" for military leave of absence, so long as the employee has not exceeded the 5 years of cumulative service provided under USERRA.

10. Can an employee be required to find someone to cover his or her work period when military duty interrupts the work schedule?

No, an employee is responsible for notification but not for altering the work schedule or finding a replacement.

11. Can an employer require an employee to reschedule drills, annual training, or any other military duty obligation?

No. When military duties would require an employee to be absent from work for an extended period, during times of acute need, or when (in light of previous leaves) the requested military leave is cumulatively burdensome, the employer may contact the military commander of the employee's military unit to determine if the duty could be rescheduled or performed by another member. If the military commander determines that the military duty cannot be rescheduled or canceled, the employer is required to permit the employee to perform his or her military duty.

12. Is an employer required to pay an employee who is on military leave of absence?

No. While many employers offer differential pay or a specific number of paid military leave days, an employer is not required to pay an employee on military leave of absence.

13. Are there time limits for an employee to return to work after completion of military duty?

Yes. There are three formats for reinstatement (application for reemployment), dependent on the duration of military service. Please refer to question 15 for a detailed breakdown of these formats. An employer should

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Ombudsman: Informal Mediation Education Support

USERRA Facts, Questions and Answers *For Employees*

1. Is an employee protected from unlawful discrimination by an employer due to military affiliation?

Yes. The USERRA provides protections for initial hiring and adverse employment actions by an employer if the actions relate, even in part, to the employee's military service. This protection also extends to potential witnesses of a discriminatory action on the part of the employer.

2. What are the basic eligibility requirements for job protection under USERRA?

To be protected, a National Guard or Reserve member must have a civilian job, must provide timely notification to the employer of military duty, and must report back to work for reemployment in a timely manner. Reemployment rights are provided even if the civilian job is described as "temporary," unless the employment was for a brief period with no reasonable expectation of continuance for a significant period of time.

3. Is there a limit to the amount of active duty an employee can perform and still have reemployment rights?

Yes, there is a 5-year cumulative total of military service an employer is required to support. Not included in that total are: involuntary recall to active duty, drills (inactive duty training), annual training, and additional training requirements determined and certified in writing by the Service Secretary concerned to be necessary for professional development or for completion of skill training or retraining.

4. Does USERRA apply to "state" military duty or governor call-ups of National Guard members?

No. However, protection for such duty is generally provided by state statutes and in most instances is comparable to protections provided under the USERRA.

5. When should an employee provide notification of upcoming duty?

Written or oral notification must be made to employers prior to going on duty, unless precluded by military necessity. Employees are highly encouraged to notify their employer of any "window" of anticipated military activity, when application for orders is made, or if notified of possible involuntary recall. Employees should be sensitive to employer scheduling requirements when providing notification and when submitting application to the unit commander for orders. Where possible, an

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6. Does an employee have reinstatement rights following voluntary military service?
Yes. There is no longer any differentiation between voluntary and involuntary orders under the USERRA, so long as the basic eligibility requirements are met.

7. What if an employee does not return in a timely manner to work?
The employee is subject to the personnel policies and practices of the employer for unexcused absences.

8. How does military service affect employee status or seniority in the workplace?
An employee must be considered not to have been absent from the workplace if the only reason for that absence was service in a uniformed service. A returning employee must be made "whole" by:

- being allowed to contribute to the pension plan any amount that would have been contributed had the employee not been absent
- being reinstated with privileges and status the employee earned by length of service (for example, after 3 years with a company an employee may be entitled to accrue more vacation per year, or after 5 years an employee is automatically advanced to a management position.)

9. What are the rules on contribution to the pension or thrift savings plan for periods of military leave of absence?
Upon reemployment, the employee has 3 times the length of service (not to exceed 5 years) to make payments and the employer is liable to fund any resulting obligation of the plan within the same time frame.

10. Can an employee contribute to the pension plan when on military leave of absence?
There is no burden under the law for an employer to continue pension contributions while the employee is away from the work site. An employer may choose to offer this benefit.

11. What are the rules for entitlement to health insurance?
For absence of less than 30 days, benefits continue as if the employee has not been absent. For absence of 31 days or more, coverage stops unless the employee elects to pay for cobra-like coverage (for a period of up to 18 months). Health insurance must be reinstated the day an employee is reinstated with no waiting period.

12. Does an employee accrue vacation or medical/sick days from the employer while on military leave of absence?
No. However, as in the previous question, an employer may choose to offer accrual of vacation or medical/sick days as an additional benefit. An employer is not required under USERRA to provide any paid benefit when an employee is not working at the worksite.

13. Does an employee have the right to make up periods of work missed due to drill or military leave of absence?
No. An employer may choose to offer an employee the opportunity to work hours missed as a benefit not provided under the USERRA. For example, an employer is not

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14. After completion of weekend drill, what is the time limit for an employee to return to work?

Either the the beginning of the next regularly scheduled work day or during that portion of the next regularly scheduled shift that would fall eight hours after the end of drill and a reasonable amount of time to commute home. For example, an employer cannot require a service member who returns home at 10 p.m. to report to work 2.5 hours later at 12:30 a.m. However, the employer can require the employee to report for the 6 a.m. shift, or scheduled work period, the next morning (after reasonable commute from military duty to home followed by 8-hours). Included in the 8 hour period is time for rest and the commute to to work.

15. What is the time limit for an employee to return to work after Annual Training or other types of extended military leave of absence?

Time limits for returning to work depend on the duration of the orders. The rules are:--

Service of 1 to 30 days: the beginning of the first regularly scheduled work day or 8 hours after the end of the military duty, plus reasonable commuting time from the military duty station to home. **Service of 31 to 180 days**: application for reinstatement must be submitted not later than 14 days after completion of military duty.

Service of 181 or more days: application for reinstatement must be submitted not later than 90 days after completion of military duty.

16. What if the employee has an accident, is delayed by lack of military transportation, or is otherwise unable to report back in a timely manner?

The employee must report back to work as soon as possible. If the reason for the employee's delay is not related to military duties, the employee is subject to the personnel policies and practices the employer would normally apply to employees with unexcused absences.

17. What if an employee is injured or incurs a disability during military duty?

The deadline for reinstatement may be extended for up to 2 years for persons who are convalescing due to a disability incurred or aggravated during military service, and employers must make reasonable accommodations for the impairment.

18. What job position is an employee returned to after military leave of absence?

Except with respect to persons whose disability occurred in or was aggravated by military service, the position into which an employee is reinstated is determined by priority, based on the length of military service. The rules are: **Service of 1 to 90 days**: (a) in the job the person would have held had he or she remained continuously employed (possibly a promoted position), so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer, or (b), if the person cannot become qualified, in the position the person was employed on the date of the commencement of the military service. **Service of 91 or more days**: (a) same as for service of 1 to 90 days, or a position of like seniority, status and pay, so long as he or she is qualified, or (b) if the person cannot become qualified, in the position the person was employed on the date of the commencement of the military service or which nearly approximates that position.

Note: *The reemployment position with the highest priority reflects the "escalator" principle, which requires that a returning service member steps back onto the*